No. 82-912

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

FEDERAL COMMUNICATIONS COMMISSION,
Appellant,
v.
LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Central District of California

BRIEF OF *AMICI CURIAE* PUBLIC BROADCASTING SERVICE AND NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS IN SUPPORT OF APPELLEES, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, ET AL.

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INTEREST OF *AMICI CURIAE*

The Public Broadcasting Service ("PBS") and the National Association of Public Television Stations ("NAPTS") submit this brief *amicus curiae* in support of Appellees, League of Women Voters of California, *et al.* PBS and NAPTS are both private, nonprofit, membership corporations organized under the laws of the District of Columbia. Each is governed by a Board of Directors elected by its members, which are the licensees of noncommercial educational, or public, television stations located throughout the United States and its territories. Neither PBS nor NAPTS has any structural ties to the Corporation for Public Broadcasting ("CPB") or any government

agency. Substantially all of the services provided by each organization are paid for by the member stations. Each may also receive corporate and foundation contributions, as well as specific project grants and contracts from CPB and others.

NAPTS was established by public television stations to perform national representational functions on their behalf. NAPTS provides an organizational framework for public television stations to coordinate their activities in non-programming areas. Its activities include research, planning, and representation of the interests of public television stations before Congress, federal agencies, CPB, and the courts.

Thus, NAPTS has a vital interest in seeing that its members are freed from the unconstitutional burden that Section 399 of the Communications Act of 1934, *as amended*, 47 U.S.C. § 399 (Supp. V 1981) ("Section 399") imposes on their First Amendment rights. That Section prohibits any noncommercial educational broadcasting station which receives CPB funding from expressing the opinion of the licensee or station management on any issue, whether partisan or not, from drunk driving to urging people to vote. Not only does this impermissibly limit public broadcasters' participation in the debate on such issues, but it deprives the public of a significant voice on matters of local concern.

PBS was established by public television stations to operate distribution facilities that interconnect the local stations by satellite and enable them to share programming on a national basis.[1] Although PBS assists its mem-

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[1] PBS stands for Public Broadcasting *Service*, not Public Broadcasting *System*, as the briefs for the government and *amicus curiae* Mobil Corporation mistakenly call it. Brief for the United States at 14 & n.23 (hereinafter cited as "Gov't Brief"); Brief of Amicus Curiae Mobil Corporation at 3. The name Public Broadcasting Service was chosen to underscore that PBS is not a network dictating program choices for affiliates, but an organization created to fill the service needs identified by its members.

bers to acquire, schedule, publicize, promote, and distribute programming, its Articles of Incorporation bar it from producing any programming or from owning and operating a broadcast station. Each member station retains the absolute right to determine whether and when to broadcast any program distributed by PBS, and PBS is but one of many programming sources for the stations. Thus, "public broadcasting" remains a collection of autonomous and fiercely independent local stations.

As a provider of programs to public television stations, PBS has a vital interest in ensuring that those stations enjoy the same programming discretion accorded other broadcasters licensed by the Federal Communications Commission ("FCC"). PBS has participated *amicus curiae*, on behalf of its member stations, before numerous courts in defense of fundamental First Amendment principles.

SUMMARY OF ARGUMENT

The government's argument that Section 399 is justified by some special obligation imposed on public broadcasters by their receipt of CPB funds reflects a fundamental misunderstanding of the federal government's role with respect to public broadcasting. Public broadcasters have no greater obligations under the Communications Act of 1934, *as amended*, 47 U.S.C. §§ 151 *et seq.* ("Communications Act"), than commercial broadcasters. Nor does the Public Broadcasting Act of 1967, *as amended*, 47 U.S.C. §§ 390-399b ("Public Broadcasting Act"), impose any such obligations on them. The only material distinction between commercial and public broadcasters is that the latter must operate on a noncommercial, nonprofit basis and, with limited exceptions, may not sell time or accept advertising. *See* 47 C.F.R. § 73.621 (1982); 47 U.S.C. § 399b (Supp. V 1981).

As the legislative record reveals, Congress assiduously sought to assure that the funds made available under the Public Broadcasting Act would not alter the existing sys-

tem of broadcast regulation in which local stations, whether commercial or noncommercial, are independent and free from federal government control. With the exception of the editorializing ban at issue here, Congress imposed no special programming obligations on public broadcast stations. Rather, within the framework of the Communications Act, which recognizes that all broadcasters have certain public responsibilities, Congress preserved the essentially private status of noncommercial broadcasters.

The government's position also reflects a basic misunderstanding of the First Amendment standard applicable to congressional attempts to limit public broadcasters' participation in public debate. The ban on editorializing is a content-based restriction which goes to the heart of the protections afforded by the First Amendment; accordingly, it can withstand First Amendment scrutiny only if it is narrowly tailored to serve a compelling government interest. The government's assertion that a lesser standard applies to First Amendment cases involving broadcast regulation, and an even lesser standard to public broadcasting, is without merit. Gov't Brief at 28-32. While some regulation of speech is permitted in the context of the broadcast media that would not be permitted in other media, those regulations, such as the fairness doctrine and personal attack rule, apply to all broadcasters and are predicated on the need for government licensing of scarce spectrum. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). That consideration is absent here, and the government has failed to identify any other special characteristic that justifies singling out public broadcasters for lesser First Amendment protection.

Further, the government has not shown that Section 399 serves any important, let alone compelling, government interest. To preserve the independence of public broadcast licensees from federal government control, it is

not necessary to suppress their editorial views. The government's fears that public broadcasters might speak with a monolithic, government-controlled voice, or be captured by other narrow interest groups, are unfounded. The diversity of public broadcast station ownership and funding, the dependence of the local station on its community for support, the insulation mechanisms of the Public Broadcasting Act, and the licensing scheme administered by the FCC effectively preclude any such abuses.

The government assumes that expression of a private opinion by a public broadcaster is an evil to be avoided. However, no valid government purpose is served by shielding the public from public broadcasters' editorial opinions. Editorializing furthers the robust debate on issues of public importance and is consistent with public broadcasting's mission. Nor is there any danger that the public will be misled by a public broadcaster's open espousal of a particular view. *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1252 (1949).

Finally, Section 399 is not the least restrictive alternative for addressing Congress' concerns about preventing the use of public broadcast stations for government propagandizing. The least intrusive remedy is simply to forbid CPB or the federal government from influencing public broadcasters' programming decisions. The government's paternalistic approach flies in the face of established First Amendment principles; more, not less, speech is the appropriate antidote for undesirable views. *Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring).

ARGUMENT

I. PUBLIC BROADCASTING IS NOT A FEDERAL ENTERPRISE, BUT A LOCAL ONE FOR WHICH CONGRESS HAS PROVIDED FINANCIAL ASSISTANCE TO ENHANCE THE LOCAL STATIONS' SERVICE.

Recognizing that the Section 399 ban on editorializing cannot be justified under traditional First Amendment standards, the government argues that it is nonetheless a constitutional infringement on public broadcasters' First Amendment rights because of "the special character of noncommercial—'*public*'—broadcasting . . . ." Gov't Brief at 5-6. The government exploits the popular connotation of "public" to argue that noncommercial broadcasters have a special obligation to their communities that justifies greater restrictions on their First Amendment rights than would be permitted for "private" commercial broadcasters.[2] The government is wrong on both the facts and the law.

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[2] Throughout the House hearings on the Public Television Act of 1967, Representative MacDonald protested that public television was a misnomer precisely because it suggests this misleading dichotomy between public and private broadcasting. *Public Television Act of 1967: Hearings on H.R. 6736 and S. 1160 Before the House Comm. on Interstate and Foreign Commerce*, 90th Cong., 1st Sess. 42-43, 106, 130, 154-155, 203, 669 (1967) (hereinafter cited as "*House Hearings*").

Public broadcasting is simply another name for noncommercial educational broadcasting, coined by the Carnegie Commission to differentiate that part of the noncommercial television station's program schedule which is directed to the general public at home from that part which is directed to students in the classroom. *Public Television Act of 1967: Hearings on S. 1160 Before the Subcomm. on Communications of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 22-23 (1967) (statement of John Gardner, Secretary of HEW) (hereinafter cited as "*Senate Hearings*"). The term quickly found favor and gained currency because it helped to free noncommercial broadcasting from the stigma of being strictly "instructional."

A. The Public Broadcasting Act Was Intended To Aid Local Public Broadcast Stations.

When Congress adopted the Public Broadcasting Act of 1967, the nation already had a system of public broadcasting that was funded largely through educational appropriations at the state and local levels.[3] While the Public Broadcasting Act added an important national dimension to public broadcasting's funding, it did not create a federal broadcasting network. Nor did it change the independent character of the existing public broadcast stations. On the contrary, Congress scrupulously sought to preserve a broadcasting system in which commercial and noncommercial broadcasters alike remain autonomous and free from any federal government control or influence.[4]

The Public Broadcasting Act represents Congress' decision that public broadcasting is an endeavor worthy of financial support. Concerned, however, that a larger infusion of federal funds might create opportunities for improper federal government influence over programming, Congress adopted the recommendations of the Carnegie Commission on Educational Television[5] and authorized the creation of a private, nonprofit corporation to distribute these funds to the stations and to program producers. Incorporated in 1968 under the District of Columbia Nonprofit Corporation Act, the Corporation for Public Broadcasting serves as that independent, nongovernmental cor-

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[3] The use of broadcast frequencies for noncommercial educational use dates back to 1919; the FCC reserved spectrum for educational radio in 1945, and for noncommercial educational television in 1952. Carnegie Commission on the Future of Public Broadcasting, *A Public Trust* 33 (1979).

[4] *See Senate Hearings* at 9 (statement of Sen. Pastore), 93 (statement of Rosel Hyde, Chairman, FCC); S. Rep. No. 222, 90th Cong., 1st Sess. 7-8, 11 (1967); H. Rep. No. 572, 90th Cong., 1st Sess. 18 (1967).

[5] Report of the Carnegie Commission on Educational Television, *Public Television—A Program for Action* (1967).

poration. 47 U.S.C. § 396(a)(6) and (7) (Supp. V 1981).

Congress took great pains to insure that CPB would not interfere with the freedom and autonomy of local public broadcast stations and, in particular, would not exercise any control over their programming decisions. It specifically charged CPB with "carry[ing] out its purposes and functions and engag[ing] in its activities in ways that will most effectively assure the maximum freedom of the public telecommunications entities and systems from interference with, or control of, program content or other activities." 47 U.S.C. § 396(g)(1)(D) (Supp. V 1981). And it barred CPB from any operational activity, such as owning stations, or producing, scheduling and distributing programs. 47 U.S.C. § 396(g)(3) (Supp. V 1981).

Recently, Congress has also restricted CPB's discretion in the allocation of its funds. Under the Public Broadcasting Amendments Act of 1981, Pub. L. 97-35, 95 Stat. 725, the majority of the funds administered by CPB (61.9% in the most recent CPB authorization) is passed through directly to the local stations according to a statutorily-based formula that takes into account objective factors such as market size. 47 U.S.C. § 396(k)(3)(A) and (k)(6) (Supp. V 1981). Although CPB has some discretion, within statutory constraints, to adjust this formula, it has no discretion to withhold any funds from stations and no authority to restrict in any way how stations use these funds. 47 U.S.C. § 396(k)(6) and (7) (Supp. V 1981).

CPB also administers a program fund from which it awards grants and contracts for production and acquisition of public television and radio programs. 47 U.S.C. § 396(k)(3)(B)(i) (Supp. V 1981). However, CPB has no authority to compel the broadcast of any program that it funds and, in the past, stations have repeatedly chosen not to air programs funded by CPB.

Thus, while the Public Broadcasting Act provides federal assistance to the local stations, it does so in a manner which preserves their complete, unfettered programming discretion. This overriding congressional concern for maintaining local public broadcast stations' autonomy is capsulized in Section 398, which further prohibits the federal government from using its funds as a lever to influence the programming activities of CPB or the stations. 47 U.S.C. § 398 (Supp. V 1981).

B. The Public Broadcasting Act Imposes No Special Programming Obligations on Public Broadcast Stations.

The government attempts to twist this statutory scheme, which Congress designed to insulate local public broadcast stations, into a scheme intended to foist special obligations on public broadcasting that are inconsistent with editorializing. The government relies on various provisions of the Public Broadcasting Act as evidence of public broadcasters' higher obligation. Gov't Brief at 16-17 & n.31. But, with the exception of the editorializing ban challenged here, none of these provisions restricts in any way the local public broadcaster's programming discretion.

For example, the government cites, as evidence of a special mandate, the requirement of "strict adherence to objectivity and balance in all programs or series of programs of a controversial nature" contained in 47 U.S.C. § 396(g)(1)(A) (Supp. V 1981). Gov't Brief at 17. This provision, however, does not apply to public broadcast stations, but only to CPB and the programs it funds. And, even as to CPB, this statutory provision serves only "as a guide to Congressional oversight policy and as a set of goals to which the Directors of CPB should aspire." *Accuracy in Media v. FCC*, 521 F.2d 288, 297 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

Nor are the accounting and financial disclosure provisions in the Public Broadcasting Act designed to do more

than provide the minimum information necessary to assure Congress that CPB funds are disbursed for the purposes for which they are appropriated.[6] Similarly, the purely advisory role of community advisory boards in no way diminishes the public broadcast station's editorial independence. The Act specifically provides that "[I]n no case shall the board have any authority to exercise any control over the daily management or operation of the station." 47 U.S.C. § 396(k)(9)(C) (Supp. V. 1981).

The equal opportunity employment provisions simply reflect the national policy against discrimination in employment. Congress added these provisions in 1978 to assure that, even though CPB is not a federal agency, public broadcasters receiving financial assistance from it comply with the policies of Title VI.[7] In doing so, Congress was careful to preserve local stations' independence from CPB and did not give CPB any enforcement

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[6] Congress carefully limited the audit requirements to avoid any possibility of control. Only CPB, not individual public broadcast stations, is subject to a GAO audit (47 U.S.C. § 396(*l*)(3)(B), (C) & (D)), and even as to CPB, the purpose of such audits "is concerned primarily with financial accountability and improved management of agency activities—not control." *House Hearings* at 24.

The Conference Report emphasizes that "the General Accounting Office is authorized, but not required, to audit the financial transactions of the Corporation," and explains that:

> Provision for a GAO audit was not originally included in H.R. 6736 because it was felt that such audits carry with them the power of the Comptroller General to settle and adjust the books being examined and that this authority would be contrary to the desired insulation of the Corporation from Government control. The Committee is also sensitive to the importance of having the Corporation free from Government control. However, the bill does not provide authority for the settlement of accounts.

H.R. Rep. No. 794, 90th Cong., 1st Sess. 14-15 (1967).

[7] *See* H.R. Rep. No. 1178, 95th Cong., 2d Sess. 38-40 (1978); *see also Senate Hearings* at 71 (Memorandum from Alanson Wilcox, General Counsel, HEW).

powers.[8] And last, the prohibitions against operating for profit, selling time, or accepting advertising simply define what differentiates public broadcasting from its commercial counterpart. They do not impose any special obligations that would justify the ban on editorializing.

Thus, none of the provisions cited by the government supports its contention that the Public Broadcasting Act created any special, inextricably linked set of obligations that hinge upon the editorializing ban. Section 399 is the only provision affecting the programming discretion of public broadcasters. In all other respects, Congress was sensitive to the First Amendment interests at stake and sought to achieve its objectives without intruding on the public broadcaster's journalistic discretion.[9] Ironically, the effect of upholding the constitutionality of Section 399 would be to sanction the very federal control that the government argues the editorializing ban was intended to prevent.

C. State and Local Government Participation in Public Broadcasting Does Not Make It a Federal Government Enterprise.

The government, in an effort to create an impression of greater federal involvement in public broadcasting, blurs the distinction between federal, as opposed to state or

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[8] Enforcement of the equal opportunity employment provisions of the Public Broadcasting Act is committed to HEW, now the Department of Health and Human Services. 47 U.S.C. § 398(b)(2)-(5) (Supp. V 1981).

[9] The government erroneously suggests that Section 397(9), which formerly defined educational television and radio programs as "primarily designed for educational or cultural purposes" somehow restricts the types of programs CPB may fund or public broadcast stations may air. Gov't Brief at 16. The government's argument is predicated on an earlier definition that is no longer applicable, and even at the time that definition applied, it was at best applicable only to CPB's activities and not to public broadcast stations. *See* Pub. L. No. 90-129, § 201, 81 Stat. 371 (1967). In all events, the definitional language is hortatory and has never been construed as limiting public broadcasters' programming discretion.

local, government funding and ownership of public broadcast stations.[10] There is no basis, however, for equating the participation of state and local entities with that of the federal government. From the beginning, when the FCC reserved frequencies for noncommercial educational use, it was contemplated that many public broadcast facilities would be licensed to and financed by state and local government entities. *Sixth Report and Order on Television Allocations*, 40 F.C.C. 148, 164-167 (1952); *id.* at 592 (separate opinion of Commissioner Hennock). In 1962, when Congress first provided funding for public broadcasting, it was aware of this state and local government involvement and sought to protect these licensees from *federal* government control or influence.[11] In 1967, it was equally clear that Congress did not intend the Public Broadcasting Act to restrain in any way the control of state and local licensees over their own public broadcast facilities.[12] Thus, the government's attempt to use this

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[10] Public broadcast licensees fall into four categories: community-based nonprofit educational corporations; state school board and educational broadcasting authorities; local school districts; and colleges and universities. As of February 1983, there were 159 public television licensees, of which 69 were nonprofit community corporations, 23 were state entities, 15 were local authorities, and 52 were institutions of higher education. These 159 licensees operated 300 transmitting stations, broken down by licensee type as follows: nonprofit community corporations (89), state entities (118); local authorities (17); and institutions of higher education (76).

[11] *See, e.g.*, House debate on H.R. 132, 108 Cong. Rec. 3532 (Mar. 7, 1962) (statement of Rep. Walter), 3536 (statement of Rep. Roberts), 3539 (statement of Rep. Hemphill), 3548 (statement of Rep. Cramer), 3549 (statement of Rep. Barry).

[12] *See, e.g.*, *House Hearings* at 417 (statement of Rep. Carter); *see also* legislative history cited at n.4 *supra*. 47 U.S.C. § 398(a) (Supp. V 1981), which prohibits federal intervention in local station operations, was originally enacted as part of the Educational Television Broadcasting Facilities Act of 1962, Pub. L. No. 87-447, 76 Stat. 64, which Congress viewed as designed to aid state and local educational authorities. In 1967, when state involvement in public broadcasting was equally clear, Congress strengthened Section 398 to provide greater protection for local licensees.

state and local involvement to justify Section 399 is inconsistent with the congressional objectives underlying federal support for public broadcasters.

In any event, this state and local involvement is irrelevant to the constitutionality of Section 399, which is triggered only by receipt of CPB funds. That state and local governments provide support for public broadcast stations does not enlarge the federal government's right to regulate their programming. As the government recognizes, "Congress adhered to the tradition of not creating federally owned stations and chose instead to furnish assistance to noncommercial stations owned and controlled by others." Gov't Brief at 16.[13]

The government ignores this distinction and misleadingly states that "[government]" owns "the majority of public stations." Gov't Brief at 7. While it is true that a substantial number of public broadcast licensees are state or local government entities, the federal government does not own a single public broadcast station.[14] Similarly, the government's claim that "[g]overnment" supplies "more than 60% of the public broadcasting income" (Gov't Brief at 7) improperly merges federal, state, and local government funding sources. In fiscal year 1982, the most recent year for which figures are available (and also the year in which CPB funding reached its highest point prior to the recent cutbacks), CPB ac-

[13] The government's attempt to merge the state and local role with that of the federal government, characterizing it all as "governmental," loses sight of the First Amendment interest in preserving the autonomy of state and local licensees. For the reasons set forth by Justice Stewart in *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 139-141 (1973), to treat public broadcasters licensed to state entities as synonymous with federal government control would be to strip them of any First Amendment rights vis-a-vis the federal government. This result would be inimical to public broadcasters' own First Amendment rights and wholly at odds with the independent broadcasting system established under the Communications Act.

[14] Indeed, the federal government is statutorily barred from such ownership. 47 U.S.C. § 305 (Supp. V 1981).

counted for only 20.5% of the funding for public broadcasting.[15] Moreover, in that same fiscal year, only 12.4% of the $135 million in nationally distributed public television programming was funded in whole or in part by federal money.[16] Even this percentage is misleading because a significant part of this money came from agencies, such as the Department of Education, whose contributions do not trigger the Section 399 prohibition.

The government's attempt to cast public broadcasting in a special "governmental" role exaggerates the importance of the federal contribution upon which Section 399 is predicated. While important, this contribution is not public broadcasting's sole support. Other entities, both public and private, play an equally important financial role.[17] Moreover, as far as the potential for government

[15] The remaining funds came from public broadcasting membership fundraising (19.1%), state government (18.9%), state colleges and universities (10.7%), businesses (10.7%), local governments (5.1%), federal grants and contracts (3.1%); foundations (2.6%), and all other sources (9.3%). Contributions from private sources accounted for a total of 41.7% of public broadcastings's FY 1982 revenues; tax-based sources contributed 58.3%. CPB, "Public Broadcasting Income, Fiscal Year 1982 (Preliminary)."

[16] These figures only reflect the value of programming distributed nationally by PBS. If the cost of local and regional programming were also taken into account, the percentage attributable to federal funding would be even lower.

[17] In 1976, almost ten years after passage of the Public Broadcasting Act, the Senate Report on a bill to extend the Educational Broadcast Facilities Program stated:

> It is worth emphasizing that the total Federal investment in the facilities program to date—approximately $106 million—has been less than 10 percent of the gross expenditure from public and private sources, and has stimulated an investment in excess of $1 billion. School systems, universities, corporations, foundations, and other public and private organizations, as well as individual citizens, have thus provided the matching cooperation and contributions which have been essential for the creation and development of local public broadcasting stations across the nation.

S. Rep. No. 813, 94th Cong., 2d Sess. 4 (1976).

control is concerned, it is inaccurate to treat disparate federal, state, and local funding sources as one. Each is motivated by different interests, and they do not act in concert.[18]

II. THE EDITORIALIZING BAN IS AN UNCONSTITUTIONAL RESTRICTION ON THE CORE FIRST AMENDMENT RIGHT OF PUBLIC BROADCASTERS TO PARTICIPATE IN THE DEBATE ON ISSUES OF PUBLIC IMPORTANCE.

A. Section 399 Is a Content-Based Regulation Which Can Be Justified Only Under the Strictest First Amendment Standards.

The government does not claim that any compelling government interest justifies the editorializing ban, but only that it furthers "important" government interests. Gov't Brief at 34, 35, 39. The government justifies this less stringent standard on the ground that broadcasting is not entitled to full First Amendment protection and that Section 399 is a content-neutral regulation. Gov't Brief at 8, 28-32.

While it is true that this Court has allowed certain limited restrictions on the free speech rights of broad-

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[18] In apparent recognition of the lesser state and local governmental involvement with community licensees, many of whom are major national program suppliers for public television, the government argues that the tax exempt status of these licensees is evidence of government entwinement. Gov't Brief at 20. However, this in no way distinguishes public broadcast stations from any other tax exempt entity, including many commercial broadcast stations, that must comply with the Internal Revenue Code provisions under which it qualifies for its exemption. Nor is it relevant to whether, consistent with the First Amendment, Congress can impose greater restrictions on the speech of public broadcasters. The limitations Congress has imposed on the activities it will subsidize through tax exemptions are properly reflected in the Internal Revenue Code and enforced by the Internal Revenue Service, not the Federal Communications Commission. *Cf. Community Television of Southern California v. Gottfried*, —— U.S. ——, 103 S.Ct. 885 (1983).

casters that would not be permitted in other media, in each case, the limitation was justified by some special characteristic of the broadcast media. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). The government argues that the scarcity and unique power of broadcast frequencies, which have justified other limitations on broadcasters' First Amendment rights, such as the fairness doctrine and personal attack rules, also justify the ban on editorializing. Gov't Brief at 29-32.

The government's argument is flawed on two counts. First, the regulations the government relies upon were designed to insure that broadcasters fulfill the public interest obligation they assumed when they received their licenses. Those regulations are intended to increase, not restrict, the diversity of views available to the public. The government cannot point to any other regulation designed to censor broadcasters' editorial judgments; and no other regulation precludes broadcasters from contributing to the debate on issues of public importance.[19]

Second, none of those regulations singles out public broadcasters for special treatment. To the extent that scarcity is the rationale for limiting broadcasters' First Amendment rights, it applies with equal force to commercial broadcasters. The FCC has exactly the same regulatory power over both commercial and noncommercial licensees.[20] Noncommercial educational broadcasters are subject to the same technical and programming rules

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[19] The FCC's oversight power to consider a licensee's use of indecent language, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), does not have the same preclusive effect on First Amendment rights as the ban at issue here. *Pacifica* requires licensees to be sensitive to community standards in choosing language to express their views, but it does not bar expression of those views. 438 U.S. at 743 n.18.

[20] *House Hearings* at 205 (statement of Rosel Hyde, Chairman, FCC). *See Community Television of Southern California v. Gottfried*, —— U.S. ——, 103 S.Ct. 885 (1983) (FCC to review public broadcasters' service to the handicapped under the same standard applicable to commercial broadcasters).

(fairness doctrine, personal attack and equal time) as commercial broadcasters. And, prior to 1967, both commercial and noncommercial broadcasters were permitted to editorialize. The government has not identified, nor can it, any special characteristic of the broadcast medium that justifies the lesser First Amendment protection for public broadcasters accorded by Section 399.[21]

Also without merit is the government's assertion that "Section 399 is a content-neutral regulation designed to

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[21] The only unique characteristic the government has identified is the fact that public broadcasters receive CPB funds. The government relies on this assistance to argue that Section 399 is a valid exercise of the Spending Power, merely restricting the activities Congress has chosen to fund. This argument mischaracterizes the impact of Section 399. It is not a limit on the manner in which public broadcasters may use CPB funds, but a condition imposed on their acceptance of those funds. Section 399 prohibits public broadcasters not just from using CPB funds to present editorials, but from editorializing if they receive any assistance from CPB at all. Under the government's rationale, if a local station receives from CPB so much as one dollar appropriated by Congress, and uses that dollar for general operating expenses, then Congress is free to attach conditions to the use of that dollar that restrict the broadcaster's programming discretion in *all* of its broadcast activities. The government's argument opens the door wide to government censorship under the guise of simple restrictions on what the government chooses to subsidize rather than infringements on First Amendment rights.

Accordingly, the editorializing ban is distinguishable from the restriction involved in *Regan v. Taxation With Representation*, —— U.S. ——, 103 S.Ct. 1997 (1983), where the federal subsidy in fact funded the proscribed activity, and where Congress provided an alternative in § 501(c)(4) of the Internal Revenue Code that would permit plaintiff to lobby. No such alternative is available to public broadcasters. Consequently, if Section 399 is to pass constitutional muster, it must meet the strict scrutiny required for any restriction on First Amendment rights. *See, e.g., Speiser v. Randall*, 357 U.S. 513 (1958). As we demonstrate, and as the district court held, it cannot pass that test. *Cf. Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1110 (D.C. Cir. 1978) (*en banc*).

assure that public funds do not go to subsidize private political and ideological activity." Gov't Brief at 8. On its face, Section 399 discriminates between different types of expression and bans only one: editorializing. The attribute that brings programming within the ban is strictly its content, namely whether it expresses the opinion of the station management.[22] It is immaterial that editorializing encompasses a range of viewpoints. A regulation that restricts particular kinds of speech is content-based.[23]

Even if, as the government suggests, the neutral purpose of Section 399 were to prevent public funds from subsidizing private political and ideological activity, it fails to achieve this result.[24] The government acknowledges that public broadcasters are free to present the private political and ideological views of anyone other than the station management. Gov't Brief at 8, 41. Therefore, to the extent that public funds support public broadcasting, they subsidize the private political and ideological views of every guest interviewed on a public affairs program, every producer of a documentary, and

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[22] In fact, the legislative history indicates that members of Congress were chiefly concerned that the content of public broadcast editorials might be unfavorable to them personally. *See* 113 Cong. Rec. 26,388, 26,391, 26,399 (1967).

[23] *See First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Carey v. Brown*, 447 U.S. 455, 462 n.6 (1980); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972); *Community-Service Broadcasting v. FCC*, 593 F.2d 1102, 1111-1112 (D.C. Cir. 1978).

[24] The government's statement that it would be fundamentally wrong to use tax money to support private views (Gov't Brief at 40) misconstrues the First Amendment interest involved. As this Court has recognized, "every appropriation made by Congress uses public money in a manner to which some taxpayers object"; the First Amendment does not preclude the use of public funds to enhance, rather than suppress, private expression. *Buckley v. Valeo*, 424 U.S. 1, 90-93 (1976).

every citizen who delivers an editorial. In short, every private view but one—that of the station management—is permitted to be expressed.

B. Section 399 Serves No Compelling Government Interest.

Section 399 is a content-based regulation that goes to the heart of the free speech rights protected by the First Amendment. To survive First Amendment scrutiny, it must serve a compelling government interest and be narrowly tailored to that end. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 535 (1980); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). The government has not advanced any interest that is sufficiently compelling to justify the restriction that Section 399 imposes on public broadcasters' exercise of their First Amendment rights. Indeed, the government has not even shown that Section 399 is narrowly tailored to achieve any valid government purpose.

1. *The Editorializing Ban Is Not Necessary To Prevent Federal Government Control of Public Broadcasters' Programming.*

The government claims that the editorializing ban is necessary to forestall any attempt by the federal government to use the power of the purse to create a government propaganda machine. This fear that public broadcasters could ever speak with a monolithic, government-controlled voice is unfounded. First, the safeguards Congress built into the Public Broadcasting Act serve to insulate the stations from such control. And nothing could be plainer than the injunction in 47 U.S.C. § 398 (Supp. V 1981) against federal control or interference in public broadcasting.

Second, each public broadcast licensee operates independently of other public broadcast licensees and is managed by individuals who are answerable to different entities, none of which speaks with a common voice. Each

exercises absolute programming discretion and bears sole responsibility for the material it broadcasts. During the Senate debate on the Public Broadcasting Act, concerns about a possible federal government "takeover" of programming were raised and quickly laid to rest:

> Most significant of the means to prevent any 'takeover' is that each local TV station is itself a complete locally controlled entity. Stations are licensed to universities, school systems and educational organizations, themselves responsible to local legislatures or citizens boards. Their charters and their Federal Communications Commission licenses forbid Federal program censorship of any sort.

Senate Hearings at 20 (statement of Sen. Pepper).

Third, contrary to the government's contention that " 'public' television stations may be less answerable to the public than commercial stations" (Gov't Brief at 40), public broadcasters are at least as, if not more, accountable. Every public broadcast licensee, regardless of its ownership, is ultimately responsible to an entity that represents the public: state and local government licensees are responsible to the citizens through their government; college licensees are responsible to their educational institutions and the communities those institutions serve; and community licensees answer to boards drawn from, and representative of, the entire community. Station management and boards have a built-in sensitivity to their community's reaction to the political overtones in their programming.[25]

Public broadcasters are also directly dependent on the public for contributions, volunteer help, corporate underwriting, donations of goods and services, contributions from local businesses, and state and local funding. This

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[25] *Senate Hearings* at 55 (statement of John Gardiner, Secretary of HEW); *House Hearings* at 161-162 (statement of Mr. Henry), 270 (statement of Mr. Case), 481 (statement of Mr. Schenkkan), 514 (statement of William G. Harvey), 516 (statement of Mr. McBride).

support is critical to the operation of their stations. Therefore, were a public broadcaster to embark on an editorial course that the audience opposed, the problem would be self-correcting.

Finally, the government's fear that public broadcast stations might be captured by a narrow interest group is irrelevant to the justification for Section 399, which is tied to CPB funding. In any event, this potential problem existed long before passage of the 1967 Act, and Congress has enacted appropriate safeguards in the Communications Act to deal with it. *See* 108 Cong. Rec. 3553 (Mar. 7, 1962) (statement of Rep. Moss). The existing system of broadcaster accountability administered by the FCC precludes the federal government, or any narrow interest group, from exercising undue influence on public broadcasters' programming. In addition, regulations such as the fairness doctrine assure that the public will receive access to a diversity of views on issues of public importance. *See Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 295 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

2. *No Valid Government Purpose Is Served by Shielding the Public from Public Broadcasters' Editorializing.*

Underlying the government's justification for Section 399 is the assumption that expression of private editorial opinion by a public broadcaster is an evil to be avoided. The government's position runs directly counter to established First Amendment principles, which recognize the valuable community service editorials provide. *See Mills v. Alabama*, 384 U.S. 214 (1966). The FCC has underscored the importance of licensee editorializing by identifying this as one of fourteen necessary program elements in a station's service. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 44 F.C.C. 2303 (1960).[26]

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[26] *Cf. RKO General, Inc.*, 44 F.C.C.2d 149, 219 (1969) ("The policy of not presenting editorials runs squarely athwart Commission

Public broadcaster editorializing is not the source of the evils the government fears. First, there is little danger that the public would be misled or duped if editorializing were permitted. An editorial is unabashedly and openly a statement of opinion, and everyone recognizes it as such. As the FCC has recognized, "[c]ertainly the public has less to fear from the open partisan than from the covert propagandist." *Editorializing by Broadcast Licensees*, 13 F.C.C. 1246, 1254 (1949).

Second, Section 399 does nothing to eliminate biased coverage of public affairs, and several congressmen made this very point:

> This Corporation could be a propaganda monster, although we have said there shall be no editorializing. Let us be realistic. An editorial is not very persuasive or influential. Let them go ahead and editorialize. Give me the right to control program content, and others can editorialize all they want to, but I will influence the thinking of the American public more with the programs or with people I have appearing on the programs.
>
> The American public knows editorials are subjective, but they believe regular programs are objective.[27]

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policy"); *Evening Star Broadcasting Co.*, 27 F.C.C.2d 316, 332 (1971) ("we consider noteworthy the fact that the licensee has regularly editorialized"); *WHDH, Inc.*, 16 F.C.C.2d 1, 10 (1969), *reh'g denied*, 17 F.C.C.2d 856, 859 (1969) (slight demerit assessed against applicant to be owned by tax-exempt foundation which would restrict its ability to editorialize).

[27] 113 Cong. Rec. 26,392, 26,405 (Sept. 21, 1967) (statement of Rep. Watson). *See* 113 Cong. Rec. 26,408 (Sept. 21, 1967) (statement of Rep. Brown).

The government erroneously asserts that Section 399 precludes the broadcast of "federal government propaganda" (Gov't Brief at 22 n.46). However, it is only licensee editorializing, not general programming, that falls within the ban. If federal funding were indeed a coercive lever, it could be used to compel the broadcast of the very propaganda the government thinks Section 399 prohibits.

These issues were among those considered by the FCC when it reversed its earlier ban and decided to allow broadcast editorials. The Commission concluded that fears similar to those raised by the government:

> are largely misdirected [and] stem from a confusion of the question of overt advocacy in the name of the licensee, with the broader issue of insuring that the station's broadcasts devoted to the consideration of public issues will provide the listening public with a fair and balanced presentation of differing viewpoints on such issues . . . . Assurance of fairness must in the final analysis be achieved, not by the exclusion of particular views because of the source of the views, or the forcefulness with which the view is expressed, but by making the microphone available for the presentation of contrary views without deliberate restrictions designed to impede equally forceful presentation.

Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1253 (1949). By taking the opposite approach and banning editorializing, Congress has deprived the public of a valuable community service and restricted the one form of expression in which bias or opinion is openly acknowledged.

The government is also wrong when it asserts that editorializing is inconsistent with public broadcasting's mission. Gov't Brief at 33-35. Under the First Amendment, public broadcasters are entitled to the same editorial rights as other journalists, and, prior to 1967, they enjoyed those rights. During this period, public broadcasters received federal funds for systems construction, equipment, programming, training, research, and planning under programs administered by the Department of Health, Education, and Welfare. *House Hearings* at 23-24, 84-87. In authorizing those funds, Congress was sensitive to the possibility of federal government pressure and committed to preserving the local public broadcast licensee's complete and unfettered control over program-

ming.[28] Although none of the legislation authorizing these HEW programs prohibited editorializing by public broadcasters, there were no problems with improper federal government influence.[29]

The government's statement that public broadcasting is obligated to "serve all" and that this is inconsistent with expression of private views stands the First Amendment on its head. Gov't Brief at 33. For it is precisely when government begins to define permissible programming that government control and influence over program content become a reality rather than a distant fear. To the extent that serving diverse audiences is one of public broadcasting's goals, it does not require bland, noncontroversial programming that reflects a consensus view rather than a private one. Rather, "service to all" is achieved by providing a range of private views to address controversial issues from diverse perspectives. And it is clear that Congress intended public broadcasters to participate fully in the debate on issues of public importance: "[p]articularly in the area of public affairs . . . noncommercial broadcasting is uniquely fitted to offer in-depth coverage and analysis which will lead to a better informed and enlightened public." S. Rep. No. 222, 90th Cong., 1st Sess. 7 (1967).

The editorializing ban prevents public broadcasters from addressing important local issues in the most effective manner. For example, a Denver newspaper recently deleted the program listings for a public television station from its daily grid. The station wanted to go on the air and encourage viewers to write protest letters to the newspaper, but felt constrained by Section 399. Another

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[28] *See* House debate on H.R. 132 at n.11 *supra*.

[29] As Congressman Springer observed in the House debate on the Public Broadcasting Act, ". . . anyone who has had any experience in the past six years knows there has not been the slightest control of any kind exercised by the Federal Government in making grants." 113 Cong. Rec. 26,407 (Sept. 21, 1967).

example involves public television's efforts to use a program scheduled for this fall, *The Chemical People*, as the focus for community outreach efforts to deal with drug and alcohol abuse. This is precisely the kind of effort that could be enhanced by allowing stations to editorialize about these problems.

The government stresses the dangers of allowing public broadcasters to become embroiled in "political" or "partisan" issues (Gov't Brief at 34), but that part of Section 399 which bars noncommercial educational broadcasting stations from supporting or opposing any candidate for political office is not challenged here. At issue is the right of public broadcasters to contribute to the public debate by providing an important perspective on the broad range of problems that arise in every community: fair housing, equal employment opportunity, environmental concerns, public and private transportation, police methods and procedures, consumer protection, public education, local and state government, city and area planning bodies, etc.

It does not suffice that public broadcasters can treat these issues in non-editorial formats. In many cases, restricting the broadcaster's choice of format silences his voice. Some issues do not lend themselves to longer treatment than an editorial. Others are time sensitive, and by the time the broadcaster could develop a program to deal with them, they would no longer be relevant. The fact that some public broadcasters may prefer not to address such issues through editorials is beside the point. Other public broadcasters will choose to editorialize.[30] The crucial First Amendment issue is whether the decision to editorialize is left to the public broadcaster or dictated by the federal government.

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[30] In the 1979 study cited by the government, more than half of the responding station managers expressed willingness to editorialize. Wollert & Haney, *Editorializing and Fundraising: Does It Mix?* 7 Pub. Telecommunications Rev., No. 5, at 35 (Sept./Oct. 1979).

C. The Editorializing Ban Is Not the Least Restrictive Alternative for Addressing Concerns about Government Propaganda.

The government has not only failed to identify any important, never mind compelling, interest to support the editorializing ban, but has also failed to demonstrate that Section 399 is narrowly tailored to achieve the government's ends. To the extent that the government seeks to prevent the use of public broadcast stations for government propagandizing, the least restrictive alternative would be to stem the problem at its source and prohibit the federal government or CPB from attempting to influence public broadcasters' programming. This is the approach adopted in Section 398 of the Public Broadcasting Act, which bars "any department, agency, officer, or employee of the United States" from using the provision of federal financial assistance "to exercise any direction, supervision, or control over public telecommunications, or over the Corporation or any of its grantees or contractors . . . ." 47 U.S.C. § 398(a) (Supp. V 1981).[31]

To the extent that the government fears editorializing could result in misuse of a public broadcasting facility, those fears are based on a paternalistic attitude at odds with basic First Amendment principles. As this Court noted when it struck down a ban on advertising the prices of prescription drugs:

> There is . . . an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976). Thus, the

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[31] The only exception to this bar is in the area of equal opportunity employment and there it is clear that programming remains insulated. 47 U.S.C. § 398(c) (Supp. V 1988).

least restrictive alternative, and preferred First Amendment remedy, is not to silence the public broadcaster, but to insure that other viewpoints are afforded an opportunity to be heard. *See Whitney v. California*, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring). This approach, reflected in the fairness doctrine and the FCC's editorializing rules, not only protects the First Amendment interests of broadcasters, but also furthers the First Amendment interest of the public in suitable access to diverse ideas on important issues.

CONCLUSION

For the foregoing reasons, Amici Curiae urge this Court to affirm the decision below and vindicate the First Amendment rights of public broadcasters and the listening and viewing public.

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